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WANTED POSTERS, BULLETPROOF VESTS, AND THE FIRST AMENDMENT: DISTINGUISHING TRUE THREATS FROM COERCIVE POLITICAL ADVOCACY

Leigh Noffsinger

Abstract: In February 1999, an Oregon jury returned a $107 million verdict for doctors who successfully argued that antiabortion activists' propaganda, in the form of posters and a web site, constituted true threats in violation of federal law. The judge rejected the activists' argument that the First Amendment protected their speech and instructed that if a reasonable person would have foreseen that the communication would be interpreted as threatening, the jury must find in favor of the plaintiffs. This Comment argues that the dichotomy of analysis under two leading U.S. Supreme Court cases has led to conflicting standards that provide insufficient means for evaluating political speech with threatening overtones. While the Supreme Court's decision in *Brandenburg v. Ohio* provides First Amendment protection for some of the most radical political speech, if applied to threats its standard would offer too much protection. The decision in *Watts v. United States*, on the other hand, offers no First Amendment protection for true threats but insufficiently defines where coercive advocacy ends and threats begin. This Comment proposes a synthesized test under which juries first would apply a four-part definition to distinguish threats from political advocacy, and second determine whether the speech poses a likelihood of imminent violence. The proposed test would offer an improved approach for evaluating political speech neither explicitly threatening nor purely abstract.

"There would seem to be some truth in the adage, 'sticks and stones can break my bones, but words will never hurt me.' Yet speech often hurts. It can offend, injure reputation, fan prejudice or passion, and ignite the world."[1]

"Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason."[2]

Imagine learning that your name and photograph appear on a poster under the boldface caption: "WANTED . . . For Crimes Against Humanity." An FBI agent contacts you to offer twenty-four-hour protection and advises you to purchase and wear a bulletproof vest. Terrified, you alternate which car you drive to work, never allow your

1. Harry H. Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105, 1106 (1979).
2. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

family to ride with you, and post an armed guard outside your office. And the "wanted" poster is just the beginning. The creators of the poster have discovered the power of technology; next they post your name on the Internet, under the title "Baby Butcher," along with your addresses at home and work, telephone numbers, spouse's name, and children's names. The web site urges people who despise your chosen profession to follow you to gather information, take pictures, and see that you are "brought to justice." Then you learn that three others pictured on posters and named on the web site have since been murdered. Your fear haunts you every day, and you consider giving up your profession.

Now, on the other hand, suppose you believe the law of the land facilitates the deaths of more than one million innocents each year. Your conscience urges you to speak out vehemently on behalf of those forever silenced, so you form an organization dedicated to overturning the law. You stage some peaceful protests to draw public attention to your cause, yet you quickly realize the need for a much stronger publicity campaign to sway the majority opinion. Outraged and impassioned in your efforts to change the status quo and believing that a divine higher law must be obeyed, you pursue a more aggressive approach: you begin "exposing" those you hold responsible for the deaths. You believe attributing these violent and deadly actions to real people—people with faces, names, addresses, and families—will prompt a public outcry demanding change in the law. You illustrate the problem with "wanted"-style posters depicting the perpetrators as criminals and outcasts. You also gather information for a web site, which notes that some who have committed these violent acts have themselves been killed. While you believe violence can be justified when used to defend others, you never have broken the law or physically harmed anyone. Yet perhaps if your political enemies feel ostracized and intimidated, some innocent lives will be saved. The next thing you know, you have been ordered to pay $107 million to those who felt threatened by your political protest.

Unlawful threats warranting injunctions and damage awards? Or protected political speech under the First Amendment? In evaluating constitutional protection for such speech, courts generally turn to one of two leading Supreme Court cases: *Brandenburg v. Ohio*,[3] which holds that abstract advocacy of dangerous ideas should receive First Amendment protection,[4] or *Watts v. United States*,[5] which holds that true

3. 395 U.S. 444 (1969) (per curiam).

4. *See id.* at 447.

threats deserve no constitutional protection.[6] However, no standard clearly distinguishes protected advocacy from unprotected threats, so courts evaluating speech have applied inconsistent and often conflicting rules that become most problematic in cases where the challenged speech resembles both advocacy and threat.

This Comment argues that courts should adopt a synthesized test for evaluating First Amendment protection for threatening speech. Part I presents the facts of *Planned Parenthood v. American Coalition of Life Activists*,[7] a recent case exemplifying problems with the current law as applied to potentially threatening political speech. Part II summarizes the two leading U.S. Supreme Court cases that address First Amendment protection for threatening speech and describes the conflicting rules developed by the circuit courts' application of these two cases. Part III argues that courts' application of either one or the other of these Supreme Court cases should be replaced with a synthesized analysis in which juries would apply a four-part definition examining the speech's content, context, audience, and intent to determine whether it constitutes a true threat; in a second step, the jury would evaluate the speech's likelihood of resulting in imminent violence. Part IV applies this two-step analysis to the facts of the *Life Activists* case.

I. *PLANNED PARENTHOOD V. AMERICAN COALITION OF LIFE ACTIVISTS*: ABORTION PROTESTORS' TACTICS ON TRIAL

In February 1999, after four days of deliberation, an Oregon jury ordered antiabortion activists to pay $500,000 in compensatory damages plus $106.5 million in punitive damages[8] to a group of abortion providers who claimed the activists had waged a "campaign of terror and

5. 394 U.S. 705 (1969) (per curiam).

6. *See id.* at 707.

7. For decisions involving this lawsuit, see *Planned Parenthood v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999) (issuing permanent injunction against defendants following jury verdict); *Planned Parenthood v. American Coalition of Life Activists*, No. CIV. 95-1671-JO, 1999 WL 65450 (D. Or. Feb. 25, 1999) (order and permanent injunction); *Planned Parenthood v. American Coalition of Life Activists*, 23 F. Supp. 2d 1182 (D. Or. 1998) (denying in part and granting in part defendants' motion for summary judgment); *Planned Parenthood v. American Coalition of Life Activists*, 945 F. Supp. 1355 (D. Or. 1996) (denying defendants' motion to dismiss).

8. *See* Sam Howe Verhovek, *Creators of Anti-Abortion Web Site Told to Pay Millions*, N.Y. Times, Feb. 3, 1999, at A1.

intimidation" against them in violation of federal statutes.[9] The plaintiffs argued that three items of propaganda constituted unlawful threats: a web site called *The Nuremberg Files*[10] and two "wanted"-style posters, one titled "The Deadly Dozen" featuring twelve doctors including three of the plaintiffs, and the other poster specifically targeting plaintiff Dr. Robert Crist.[11] The defendants argued that the propaganda contained no explicitly threatening language and constituted political expression protected by the First Amendment.[12]

The Freedom of Access to Clinic Entrances Act (FACE)[13] provided the primary basis for the suit.[14] Congress enacted the 1994 federal law[15] in response to intensifying confrontations and increasing violence at abortion clinics.[16] The FACE sections pertinent to the suit provide civil penalties and damages against anyone who uses a threat of force intentionally to intimidate someone associated with reproductive health services.[17] FACE defines "intimidate" as "[placing] a person in reasonable apprehension of bodily harm to him or herself or to

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9. *Life Activists*, 23 F. Supp. 2d at 1185.

10. *Visualize Abortionists on Trial: The Nuremberg Files* (visited Jan. 8, 1999) <http://www.christiangallery.com/atrocity/> [hereinafter *The Nuremberg Files* web site] (on file with author). The trial court on March 16, 1999, issued a permanent injunction enjoining and restraining antiabortion activists from distributing any information on *The Nuremberg Files* web site, and the site has been either accessible on a restricted basis or inaccessible since the jury verdict. *See Life Activists*, 41 F. Supp. 2d at 1155–56.

11. *See Life Activists*, 23 F. Supp. 2d at 1194.

12. *See Life Activists*, 945 F. Supp. at 1370.

13. 18 U.S.C. § 248 (1994).

14. *See Life Activists*, 945 F. Supp. at 1362.

15. *See* Pub. L. No. 103-259, 108 Stat. 694 (codified as amended at 18 U.S.C. § 248 (1994)).

16. Congress enacted FACE "to protect and promote the public safety and health . . . by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services." Pub. L. No. 103-259, § 2, 108 Stat. 694, 694. For a discussion of antiabortion activists' recent activities, see Angela Christina Couch, *Wanted: Privacy Protection for Doctors Who Perform Abortions*, 4 Am. U. J. Gender & L. 361 (1996).

17. *See* 18 U.S.C. § 248(a)–(c).

> Whoever—(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c).

18 U.S.C. § 248(a).

another."[18] However, as FACE explicitly states, the law may not be construed "to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution."[19]

A. The Nuremberg Files Web Site

The stated purpose of *The Nuremberg Files* web site was:

> [C]ollecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity. . . .
>
> One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes.
>
> We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against the wanton slaughter of God's children (as it surely will).[20]

The web site contained photographs of fetal body parts and animated drawings of dripping blood.[21] According to court files, an earlier version of the web site contained the statement "[E]verybody faces a payday someday, a day when what is sown is reaped."[22]

The first page of *The Nuremberg Files* web site provided a hypertext link to another site containing lists of names, titled "Alleged Abortionists and Their Accomplices."[23] Above the first list, titled "ABORTIONISTS: the baby butchers," the site provided: "Legend: Black font (working); Greyed-out Name (wounded); ~~Strikethrough~~ (fatality)."[24] The site listed

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18. 18 U.S.C. § 248(e)(3).

19. 18 U.S.C. § 248(d)(1) (1994).

20. *The Nuremberg Files* web site, *supra* note 10 (emphasis in original).

21. *See id.*

22. Planned Parenthood v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1187 (D. Or. 1998).

23. *Alleged Abortionists and Their Accomplices* (visited Jan. 8, 1999) <http://www.bestchoice.com/atrocity/aborts.html> [hereinafter *Alleged Abortionists* web site] (on file with author).

24. *Id.*

the names of murdered abortion providers David Gunn and John Britton, among others, indicated as fatalities.[25] Gunn and Britton had been the subjects of wanted-style posters similar to the Deadly Dozen poster.[26] The site also provided the American Medical Association's web site address to allow visitors "to search for the location of the baby butcher's slaughter shop."[27]

B. The Deadly Dozen Poster

The Deadly Dozen poster contained the boldface heading "GUILTY of Crimes Against Humanity" followed by another boldface heading, "THE DEADLY DOZEN," and the names, addresses, and telephone numbers of twelve people, including three of the plaintiffs.[28] Activists presented the poster at a press conference held during an American Coalition of Life Activists (ACLA) meeting in 1995 and urged people to provide information to assist in the prosecution of abortion as a war crime.[29] The poster offered a $5000 reward for "information leading to [the listed doctors'] arrest, conviction and revocation of license[s] to practice medicine."[30] However, the size and boldness of the print visually emphasized the words, "GUILTY OF CRIMES AGAINST HUMANITY . . . THE DEADLY DOZEN . . . $5,000 REWARD . . . ABORTIONIST."[31]

C. The Crist Poster

The poster targeting Dr. Robert Crist, distributed during a 1995 antiabortion conference,[32] resembled the Deadly Dozen poster but also included Dr. Crist's photograph and text describing him as a "notorious Kansas City abortionist [who] travels to St. Louis weekly to kill babies at

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25. *See* Planned Parenthood v. American Coalition of Life Activists, 41 F. Supp. 2d 1130, 1134–35 (D. Or. 1999).

26. *See id.*

27. *Alleged Abortionists* web site, *supra* note 23.

28. Planned Parenthood v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998).

29. *See id.*

30. *Id.*

31. *Id.*

32. *See id.*

Reproductive Health Services.... He also sometimes kills women."[33] The poster then requests, in tiny print, "Please write, leaflet or picket his neighborhood to expose his blood guilt. Ask Crist to turn from killing and injuring women and children, to helping and healing those in need."[34] The poster then states "$500 REWARD" in large print, followed by tiny print, "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines."[35]

The plaintiffs in the case argued that the web site and posters constituted threats illegal under federal statutes and unprotected by the First Amendment. The defendants, however, said the propaganda merely expressed political ideas and advocated change in the laws protecting abortion rights.

II. CONSTITUTIONAL PROTECTION FOR THREATS AND ADVOCACY

In 1969, the U.S. Supreme Court decided two cases analyzing two types of potentially threatening speech. In *Watts v. United States*, the Court announced that "a threat must be distinguished from what is constitutionally protected speech," holding that "true threats" fall outside the purview of the First Amendment.[36] A few months later, in *Brandenburg v. Ohio*, the Court greatly expanded First Amendment protection for speech advocating the use of violence, holding that abstract advocacy deserves protection unless "directed to inciting or producing imminent lawless action and... likely to incite or produce such action."[37] Most subsequent lower court decisions have evaluated potentially threatening speech either under *Watts*—when the challenged speech resembles a "true threat"—or under *Brandenburg*—when the speech appears to incite others to take some unlawful action—but rarely under both cases.[38]

33. *Id.* at 1186–87.

34. *Id.* at 1187.

35. *Id.*

36. *See* 394 U.S. 705, 707 (1969) (per curiam).

37. *See* 395 U.S. 444, 447 (1969) (per curiam).

38. *See infra* Part II.C.

A. Watts v. United States: *"True Threats" Deserve No First Amendment Protection*

In *Watts*, the Supreme Court reversed the conviction of an eighteen-year-old man prosecuted under a federal statute prohibiting threats against the life of the President.[39] The man's conviction followed an antidraft sentiment he voiced during a political rally: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[40] The Court considered the conditional nature of the statement, the context of the political debate, and the audience's reaction of laughter in holding that the statement constituted "political hyperbole" deserving First Amendment protection, rather than a threat.[41]

The Court held that while true threats are not entitled to First Amendment protection, some speech appearing threatening on its face does not rise to the level of a true threat and should receive constitutional protection. The Court's opinion, however, failed to provide guiding analysis on how courts should distinguish between the two types of speech. Instead, the decision offered little more than a directive that "[w]hat is a threat must be distinguished from what is constitutionally protected speech."[42] Because the opinion included no explicit test or criteria broadly applicable to other cases, the lower courts have developed a patchwork of tests for assessing whether speech constitutes a threat unprotected by the First Amendment.[43]

B. Brandenburg v. Ohio: *Abstract Advocacy Receives First Amendment Protection*

The Supreme Court in *Brandenburg v. Ohio* held that the First Amendment protects speech advocating the necessity of violence as a concept.[44] *Brandenburg* focused on a Ku Klux Klan leader's racist speech during which he said, "Send the Jews back to Israel. . . . Bury the niggers. . . . We intend to do our part. . . . We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court,

39. *See* 394 U.S. at 708 (applying 18 U.S.C. § 871(a) (1917)).

40. *Id.* at 706.

41. *Id.* at 708.

42. *Id.* at 707.

43. *See infra* Part II.C.

44. *See* 395 U.S. 444, 447 (1969) (per curiam).

continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[45] The speech took place during a KKK rally in which twelve people wearing hoods and carrying firearms burned a large wooden cross.[46] The Court stated, "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[47] To distinguish protected advocacy from unprotected speech promoting violence, the Court specified that speech falls outside First Amendment protection only "where such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action."[48]

The *Brandenburg* decision rests on the ideal that the First Amendment should protect even the most dangerous ideas, so long as the ideas have no likelihood of causing imminent violent action.[49] The decision clarified the change in First Amendment interpretation from the 1920s, when the Court in *Whitney v. California*[50] had held that words advocating violence could be prohibited.[51] The *Brandenburg* Court expressly overruled *Whitney* and clarified that advocacy alone could not be punished unless its goal and likely outcome were to produce "imminent lawless action."[52] *Brandenburg* established a standard protecting advocacy for virtually any cause or opinion, from anarchy to fascism, so long as the speaker advocates ideas rather than incites violent action.[53]

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45. *Id.* at 446 & n.1 (second notation in original).

46. *See id.* at 445.

47. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

48. *Id.* at 447 (emphasis added).

49. *See id.*

50. 274 U.S. 357 (1927).

51. *See id.* at 371–72.

52. *Brandenburg*, 395 U.S. at 447.

53. *See, e.g.*, Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (en banc). The court, relying on *Brandenburg*, gave the following examples of protected speech:

> [A] new sect of religious fanatics [who] announced that unless Chicagoans renounce their sinful ways it may become necessary to poison the city's water supply, or a newly organized group of white supremacists [who] vowed to take revenge on Chicago for electing a black mayor[,] . . . [or] Puerto Rican separatists [who] went around Chicago making speeches to the effect that, if the United States does not grant Puerto Rico independence soon, it will be necessary to begin terrorist activities on the mainland United States.

Id. at 1014.

C. *No Clear Standard Distinguishes True Threats from Abstract Advocacy*

Because most courts have identified *Brandenburg* and *Watts* as separate and alternative approaches for evaluating potentially threatening language, cases that do not fit neatly into *Brandenburg*'s incitement definition or *Watts*' true threat exemption often receive superficial and inconsistent treatment. Courts' evaluation of threatening speech often includes evaluation of the speech's content and context, the audience, and the speaker's intent, yet the analysis varies widely.[54] For example, in determining First Amendment protection, most courts consider the message's context,[55] yet some allow a violent atmosphere to provide the basis for removing protection for speech while others hold that unrelated violence cannot be the basis for silencing expression.[56] Although courts often look to the speaker's chosen audience and specificity of the message,[57] courts have not adopted such criteria as standard considerations evaluated in all cases. Some courts examine the speaker's specific intent while others use an objective reasonable person standard.[58] These differences in analysis usually flow from a court's initial decision to apply *Brandenburg*'s analysis for advocacy or *Watts*' analysis for true threats.

1. *The Speech's Content: Specificity of Message Can Indicate Whether Speech Is Threat or Advocacy*

When evaluating whether speech constitutes a threat or advocacy, most courts begin with the actual words used. A statement that appears threatening on its face often can form the initial basis for finding a true threat.[59] Sometimes, however, meaning is ambiguous or obscure. For example, in *United States v. Fulmer*,[60] a jury convicted the defendant for threatening an FBI agent in a voicemail message saying, "The silver

54. *See infra* Part II.C.

55. *See infra* Part II.C.2.

56. *See infra* Part II.C.2.

57. *See infra* Part II.C.3.

58. *See infra* Part II.C.4.

59. *See, e.g.*, Shackelford v. Shirley, 948 F.2d 935, 937 (5th Cir. 1991) (denying First Amendment protection to man who telephoned former work supervisor and said next time supervisor came by his car lot he would be "toting an ass whipping").

60. 108 F.3d 1486 (1st Cir. 1997).

bullets are coming."[61] In evaluating the words' meaning—ambiguous in light of the message's innocuous and even cordial tone[62]—the trial court considered testimony about how the statement could be understood, how news media had used the phrase, and what the defendant meant by the words.[63] The FBI agent believed the message constituted a death threat, while the defendant argued that he meant "silver bullets" to describe "a clear-cut simple violation of law."[64] Fulmer had been providing information to the FBI agent about alleged illegal acts and argued that "silver bullets" meant the crucial evidence needed.[65] The jury found that the message contained a true threat, and Fulmer received a five-month prison sentence.[66]

The specificity of the message's content, as well as whether the speaker explicitly named or implicitly identified a particular target, can indicate the distinction between threats and advocacy. In *Brandenburg*, the speaker chose a broad target consisting of large racial groups rather than specific individuals, and he failed to specify what "action" the KKK might take.[67] In threat cases, on the other hand, the speaker generally makes explicit the target and the harm threatened.

When examining content, courts always exercise caution to avoid making decisions based on approval or disapproval of the ideas expressed in the speech. The Supreme Court has long applied stringent standards when evaluating content-based restrictions on speech.[68] Nontheless, an examination of content that focuses solely on whether the specific words chosen constitute a threat does not equate to content-based discrimination under the Supreme Court's decision in *R.A.V. v.*

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61. *Id.* at 1489–90.

62. The message in its entirety said:

> Hi Dick, Kevan Fulmer. Hope things are well, hope you had an enjoyable Easter and all the other holidays since I've spoken with you last. I want you to look something up. It's known as misprision. Just think of it in terms of misprision of a felony. Hope all is well. The silver bullets are coming. I'll talk to you. Enjoy the intriguing unraveling of what I said to you. Talk to you, Dick. It's been a pleasure. Take care.

Id. at 1490.

63. *See id.*

64. *Id.*

65. *See id.* at 1489–90.

66. *See id.*

67. *See* Brandenburg v. Ohio, 395 U.S. 444, 446 (1969) (per curiam).

68. For scholarly discussion, see generally Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975) and Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983).

City of St. Paul.[69] "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[70]

While an examination of content often provides the springboard into analysis of challenged speech, courts never end their evaluation there. Context lends meaning to content, and courts routinely consider any context having relevance to the communication.

2. *Context of Violence: Classifying Speech as Threat or Advocacy Changes Evaluation of Surrounding Circumstances*

Context provides an essential background for courts to consider when evaluating speech. The narrow context in which the speaker communicates—including the surrounding facts, tone of voice, and manner of the speaker—provides one level of inquiry. Yet to evaluate fully any subtext or deeper implied message, courts also consider the broader context in which the speaker communicates. This broader context can include a general atmosphere of violence surrounding certain types of speech or past acts of violence. Because the principle of denying First Amendment protection for threatening speech lies in preventing fear or risk of physical harm, any related violence can dramatically lessen the protections given to speech. While the Supreme Court has limited the degree to which courts may rely on a violent atmosphere in denying constitutional protection for advocacy, courts routinely consider evidence of violence—even when unrelated to the speech or the speaker—in assessing whether speech constitutes a threat. The lack of clarity about the degree to which a violent context should shape a court's decision on speech protections has led to the use of inconsistent standards.

a. *Speech in an Atmosphere of Violence*

Courts have relied on violent context to deny First Amendment protection for threats, while granting protection for speech made in a similar violent context but considered political advocacy. In evaluating speech presumed a threat, courts have considered a broad range of

69. 505 U.S. 377 (1992).

70. *Id.* at 388.

contextual facts, from a general atmosphere of violence and intimidation unrelated to the particular speech at issue, to facts surrounding the specific situation involving the same speaker or audience. In *United States v. Khorrami*,[71] for example, the Seventh Circuit considered terrorism in the Middle East and an atmosphere of anti-Semitism, as well as bomb threats previously directed to the Jewish National Fund, in holding that phone messages and mail directed at the organization constituted threats.[72] In a case presenting facts very similar to *Life Activists* and involving one of its plaintiffs, the Eighth Circuit held in *United States v. Dinwiddie*[73] that an antiabortion activist's increasingly violent words and references to murdered abortion doctors crossed the line into unprotected speech.[74] In assessing the context for her speech, the court considered the defendant's well-known opinion that lethal force was warranted to prevent doctors from performing abortions.[75] The court noted that a prior statement by the defendant advocating violence as a concept, although protected by the First Amendment, could be introduced to show violent context in a threat case.[76]

When evaluating political advocacy under *Brandenburg*, however, a violent context cannot provide the basis for suppressing speech. In *Brandenburg*, the Court did not consider the broader context of race relations or the lynchings that historically had followed some cross burnings. The sole inquiry was whether the speech at issue was directed toward and likely to produce imminent violence.[77] Likewise, in *NAACP v. Claiborne Hardware*,[78] a 1982 case analyzed under *Brandenburg*, the Court held that when the speech at issue failed to result in violence, other related violence could not justify suppressing the speech.[79] In *Claiborne Hardware*, white merchants sought an injunction against civil rights boycott leaders including Charles Evers, who attempted to strengthen the boycott by telling a group of African-Americans, "If we catch any of you

71. 895 F.2d 1186 (7th Cir. 1990).

72. *See id.* at 1188–89.

73. 76 F.3d 913 (8th Cir. 1996).

74. *See id.* at 925–26.

75. *See id.* at 929. The defendant repeatedly used a bullhorn to tell Dr. Robert Crist, "Robert, remember Dr. Gunn [a physician killed in 1993 by an abortion opponent]. . . . This could happen to you. . . . He is not in the world anymore." *Id.* at 917.

76. *See id.* at 918, 925.

77. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

78. 458 U.S. 886 (1982).

79. *See id.* at 908–09.

going into any of them racist stores, we're gonna break your damn neck."[80] While some violent acts occurred later, the Court held that the speech itself did not "incite lawless action," so it should receive First Amendment protection.[81] Following this precedent, courts using the *Brandenburg* test look specifically for a link between the speech and resulting acts of violence.

In *United States v. Dellinger*,[82] the Seventh Circuit analyzed speech made by antiwar demonstrators in Chicago that resulted in violent confrontations with police during the Democratic National Convention of 1968.[83] Despite the fact that violence had followed the demonstrators' speech, the court evaluated each of the defendants' words in determining which expressions actually incited violence and which did not.[84] In conducting such a specific analysis, the Court relied on *Brandenburg*'s rule that speech advocating violence can be denied First Amendment protection only when likely to incite imminent violence.[85]

b. Similar Speech Previously Causing Violence

While courts have held it impermissible to sanction political advocacy because similar prior speech led to violence, courts evaluating allegedly threatening speech commonly deny constitutional protection where similar speech on past occasions resulted in violence. Courts evaluating political advocacy have held that the government may not silence such speech to prevent potential violence. In *Collins v. Jordan*,[86] for example, the Ninth Circuit held that the San Francisco mayor and police chief acted improperly by ordering the arrest of political activists to prevent violence from ensuing as it had at earlier protests.[87] "The generally

80. *Id.* at 902.

81. *Id.* at 928.

82. 472 F.2d 340 (7th Cir. 1972).

83. *See id.* at 349–50.

84. *See id.* at 394–407. The court found that one defendant's announcement nearly four weeks before the demonstrations that students would "flood the Loop with demonstrators, cause disturbances in the Loop, and . . . [that] the Loop would fall" was protected speech. *Id.* at 395. On the other hand, the same defendant's statement two weeks later advising demonstration organizers that people "should try to disrupt traffic, should smash windows, run through the stores and through the streets[,] . . . [and] [g]enerally make havoc in the Loop area" did not constitute protected advocacy and could be sanctioned. *Id.*

85. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

86. 110 F.3d 1363 (9th Cir. 1997).

87. *See id.* at 1371–72.

accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct."[88] Courts analyzing threats, on the other hand, commonly consider previous violent acts resulting from speech similar to that being challenged. Juries often hear detailed evidence about past speech and violent acts when determining whether the current speech should be viewed as a true threat, even if the defendants had no link to such violence.[89] In employing an objective test, the factfinder may rely on past resulting violence to find that a reasonable person would foresee that the current speech would be interpreted as a threat. *Dinwiddie* offers an example: the court referred to past violence by other abortion protestors to uphold the defendant's conviction for threatening a doctor, even though the evidence showed no direct connection between the defendant and any actual violence.[90]

c. *Speech Having No Violent Result*

Speech failing to result in violence or unlawful acts presumptively receives constitutional protection when the speech is classified as advocacy but not when the speech is considered a threat. *Claiborne Hardware* held that when speech advocating lawlessness fails to result in violence, courts should presume the speech deserves First Amendment protection.[91]

Under *Watts*' true threat doctrine, courts hold that threatening speech can be prohibited without regard to whether actual violence resulted. In *McCalden v. California Library Ass'n*,[92] the Ninth Circuit reviewed statements by the American Jewish Committee that a library conference would be disrupted, property would be damaged, and the Library Association would be "wiped out" if it did not cancel its contract renting space to a Holocaust revisionist who claimed the Holocaust never

88. *Id.* (citations omitted); *see also* Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1014 (7th Cir. 1984) (en banc) (holding FBI should be free to investigate groups communicating antigovernment messages before actual violence occurs, but First Amendment prohibits suppression of speech as preventive measure).

89. *See, e.g.*, Planned Parenthood v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1188 (D. Or. 1998).

90. *See* United States v. Dinwiddie, 76 F.3d 913, 918 n.2 (8th Cir. 1996).

91. *See* NAACP v. Claiborne Hardware, 458 U.S. 886, 908–09 (1982).

92. 955 F.2d 1214 (9th Cir. 1992).

occurred.[93] Even though the speech contained no overt threat of bodily harm and no actual harm resulted, the Ninth Circuit distinguished *Brandenburg* and *Claiborne Hardware*, saying those cases "involved public speeches advocating violence, not privately communicated threats of violence as are alleged here."[94] Thus, while courts routinely consider context in determining First Amendment protection for speech, courts place different importance on the role of a violent atmosphere or specific violent acts, depending on whether they view the speech at issue as political advocacy or as a threat.

3. *The Audience: General Audience or Specific Target Can Indicate Whether Speech Is Threat or Advocacy*

Consideration of the speaker's chosen audience often illuminates the line between protected speech and unprotected threats. For example, the court in *Dinwiddie* acknowledged that the defendant's prior statements supporting murder as justifiable homicide to prevent abortion constituted protected advocacy; however, once she turned her opinion toward a specific doctor in a face-to-face confrontation, the court found the speech constituted a threat.[95] Similarly, in *Khorrami*, the defendant's words "death to all Jews" likely would have been protected as general advocacy of an opinion had they not been spoken onto the Jewish National Fund's answering machine.[96] The distinction between directing speech toward a general audience or a specific target also could explain the different outcomes in *Brandenburg*, in which a cross was burned at a private KKK rally, and *United States v. J.H.H.*,[97] where the defendants burned a cross in an African-American family's fenced-in backyard.[98] The Supreme Court in *Cohen v. California*[99] acknowledged that speech directed at the general public should be viewed differently from speech directed at a particular person.[100]

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93. *See id.* at 1217.

94. *Id.* at 1222.

95. *See Dinwiddie*, 76 F.3d at 929.

96. *See* United States v. Khorrami, 895 F.2d 1186, 1188 (7th Cir. 1990).

97. 22 F.3d 821 (8th Cir. 1994).

98. *See id.* at 823.

99. 403 U.S. 15 (1970).

100. *See id.* at 20–23 (1970) In evaluating a case against a man who wore a jacket bearing the message "Fuck the draft," the Court noted that if man had directed his speech toward a specific "person of the hearer," such targeting would provide one piece of evidence supporting restrictions on

The majority of cases analyzed under *Watts* have involved face-to-face threats made in an obvious attempt to intimidate, such as a suspect threatening to assault the police officer arresting him.[101] In such cases, the speaker specifically directs comments to the target of the threat. Courts generally have no problem deciding that such speech does not deserve First Amendment protection under both *Watts* and a 1942 Supreme Court decision, *Chaplinsky v. New Hampshire*,[102] which held that "fighting words" threatening or provoking physical assault are outside the scope of First Amendment protection.[103]

Even when the speaker names a specific target, though, courts generally consider other factors as well. As an example, in *Watts* the defendant named "L.B.J." as his target, yet the Court also considered the audience to whom Watts addressed the speech in holding that the speech constituted political hyperbole.[104] Similarly, the Court in *Claiborne Hardware* determined that the speech should be viewed as part of a legitimate political movement, even though Charles Evers directly threatened the audience with physical violence if they broke the boycott.[105]

Courts considering the speaker's chosen audience also evaluate the audience's reaction to the speech. From the reaction of laughter in *Watts*[106] to the reaction of fear in *Dinwiddie*,[107] courts consistently remain cognizant of the reaction prompted by the speech. While the audience's reaction cannot dictate the First Amendment protection afforded, courts do consider a reaction of fear as evidence that the message reached a

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speech. *Id.* "No individual actually or likely to be present could reasonably have regarded the words on [Cohen's] jacket as a direct personal insult. . . . There is . . . no showing that anyone who saw Cohen was in fact violently aroused or that [he] intended such a result." *Id.*

101. *See* United States v. Orozco-Santillan, 903 F.2d 1262, 1264 (9th Cir. 1990) (upholding conviction of defendant who told federal law enforcement officer, "[T]ake these handcuffs off and I'll kick your fucking ass. . . . Somebody is going to die."); *see also* United States v. Cox, 957 F.2d 264, 265 (6th Cir. 1992) (upholding conviction of defendant who told bank employees, "[Y]ou all better have my personal items to me by five o'clock today or it's going to be a lot of hurt people there.").

102. 315 U.S. 568 (1942).

103. *See id.* at 569, 572 (upholding conviction under state law prohibiting "offensive, derisive or annoying word to any other person who is lawfully in any . . . public place" because "fighting words" receive no First Amendment protection).

104. *See* Watts v. United States, 394 U.S. 705, 708 (1969).

105. *See* NAACP v. Claiborne Hardware, 458 U.S. 886, 928 (1982).

106. *See Watts*, 394 U.S. at 707.

107. *See* United States v. Dinwiddie, 76 F.3d 913, 918 (7th Cir. 1990).

specific target and resulted in intimidation, which would indicate a frightening content, a violent context, or an intent to intimidate.

4. *The Speaker's Intent: Courts Inconsistently Consider Defendants' Subjective Desire to Threaten or to Communicate Ideas*

When evaluating alleged threats, most circuits—rather than determining whether the speaker actually intended to threaten—apply an objective test asking whether a reasonable person would interpret the speech as a threat.[108] This objective test has taken various forms, some focused on a reasonable speaker and some on a reasonable listener, and has resulted in widely divergent outcomes.[109]

Brandenburg's inquiry into whether the speech at issue was "directed" to inciting violence seems to imply that some requisite intent by the speaker must exist before constitutional protections for political advocacy are denied. While *Brandenburg* applies to advocacy cases, some courts also have looked for specific intent on the part of the speaker when evaluating threats under *Watts*. In *J.H.H.*, the Eighth Circuit affirmed the convictions of juveniles who burned crosses in the fenced yard of an African-American family to scare the family into leaving the neighborhood.[110] Although the boys' expressive acts closely resembled those given First Amendment protection in *Brandenburg*, the *J.H.H.* court distinguished the case based on the boys' subjective intent

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108. *See, e.g.*, Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (noting context of increasing school violence when reversing trial court's finding that student's statement to school counselor was protected by First Amendment. Student claimed her statement, "I'm so angry, I could just shoot someone!" constituted figure of speech; counselor reported that student said, "If you don't give me this schedule change, I'm going to shoot you!"); United States v. Aman, 31 F.3d 550, 551 n.2, 557 (7th Cir. 1994) (holding First Amendment did not shield defendant who sent letter to ex-wife's attorney saying, "Every time I read about yet another nasty judge or disgusting shyster killed, I rejoice: 'Great! One less piece of shit to terrorize us decent people!'" Though defendant said he intended only to express anger rather than threaten and no actual violence resulted, court upheld conviction.).

109. *See, e.g.*, United States v. Myers, 104 F.3d 76, 79 (5th Cir. 1997) (considering whether communication "in its context . . . would have a reasonable tendency to create apprehension that its originator will act according to its tenor") (citations omitted); *Aman*, 31 F.3d at 553 (considering whether "reasonable person would foresee that the statement would be interpreted . . . as a serious expression of an intention to inflict bodily harm") (citations omitted); United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) (considering whether "an ordinary, reasonable recipient . . . familiar with the context . . . would interpret [the statement] as a threat of injury") (citations omitted); United States v. Bellrichard, 994 F.2d 1318, 1323–24 (8th Cir. 1993) (considering that if reasonable recipient would interpret communication as threat, issue should go to jury).

110. *See* United States v. J.H.H., 22 F.3d 821, 826–27 (8th Cir. 1994).

to threaten and intimidate the family, contrasted with Brandenburg's intent to communicate ideas.[111] Using a similar subjective intent requirement, the Eighth Circuit in *United States v. Lee*[112] reached an opposite result despite facts quite similar to *J.H.H.*[113] The appeals court, in reversing Lee's conviction and remanding for a new trial, held that the First Amendment protected Lee's action because the prosecution had failed to prove the two elements required by *Brandenburg*: that the defendant intended to incite violence and that such violence likely would result.[114]

In *United States v. Kelner*,[115] the Second Circuit combined elements of analysis from both *Watts* and *Brandenburg* to find a true threat.[116] The government charged the defendant under a federal statute after he announced to news reporters that his group intended to assassinate Yasser Arafat.[117] In interpreting the speech, which contained a political message as well as a threat, the court held that because evidence showed the defendant had specific intent to execute his threat, the speech was not protected.[118] This analysis combined *Brandenburg*'s implied requirement of specific intent, along with *Watts*' principle that serious threats receive no constitutional protection.

In overturning the conviction of a college student who posted fictional stories on the Internet describing rape, torture, and murder of young women and girls, the Sixth Circuit in *United States v. Alkhabaz*[119] held that a true threat must meet both *mens rea* and *actus reus* requirements.[120] In one story, the defendant used a classmate's name for

111. *See id.* at 825–26.

112. 6 F.3d 1297 (8th Cir. 1993).

113. *See id.* at 1297–98.

114. *See id.* at 1304.

115. 534 F.2d 1020 (2d Cir. 1976).

116. *See id.* at 1027 (holding that defendant's statements constituted true threat that "on its face and in the circumstances [was] . . . so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution").

117. *See id.* at 1020–21. During a visit to the United States by the Arab leader, Kelner said, "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive. . . . We are planning to assassinate Mr. Arafat. . . . Everything is planned in detail." *Id.* at 1021.

118. *See id.* at 1027.

119. 104 F.3d 1492 (6th Cir. 1997).

120. *See id.* at 1495. *Actus reus* is "the physical aspect of a crime, whereas the *mens rea* (guilty mind) involves the intent factor." *Black's Law Dictionary* 22 (abr. 6th ed. 1991).

the story's victim.[121] The court held that the man made no threat because he had neither the intent to intimidate nor the intent to execute the acts he described.[122]

III. PROPOSAL: A FOUR-PART DEFINITION DISTINGUISHING THREATS FROM ADVOCACY

Because speech can be ambiguous and difficult to categorize, the distinction between subtle threats and coercive advocacy can be difficult to draw.[123] As a result of the existing dichotomy in analysis of threats and advocacy, a court's initial determination of how to classify the speech at issue can significantly alter case outcomes. While courts exercise careful scrutiny of advocacy before rejecting a First Amendment defense under *Brandenburg*, courts generally employ minimal scrutiny once categorizing speech as a threat under *Watts*.[124] Because this decision to evaluate speech as a threat or as advocacy can dramatically change the constitutional protection afforded, courts should employ the same analysis in all cases. The problem lies not in the shortcomings of the rules presented by *Watts* and *Brandenburg* but instead in the lack of any clear definition to distinguish threats from advocacy.[125] The *Life Activists* case highlights the shortcomings of current analysis as applied to politically motivated speech, made in the context of related violence, and understood by others as threats.[126]

Evaluating potentially threatening speech should be a two-part process. The jury first should determine whether the speech meets the definition of a true threat; if the evidence shows that the speech

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121. *See Alkhabaz*, 104 F.3d at 1493.

122. *See id.* at 1496; *see also* United States v. Baker, 890 F. Supp. 1375, 1388 (E.D. Mich. 1995) (finding that defendant's e-mail message to unidentified recipient did not constitute true threat because he expressed only desire, not intention, to kidnap and torture girls).

123. *See* United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983).

124. *See* Robert Kurman Kelner, Note, United States v. Jake Baker*: Revisiting Threats and the First Amendment*, 84 Va. L. Rev. 287, 289 (1998).

125. *See* David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 Wm. & Mary Bill Rts. J. 733, 738–42 (1998).

126. *See* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the* Brandenburg *Test*, 29 Ga. L. Rev. 1, 2, 5 (1994). "[I]n spite of the deference that we grant to speech falling short of actual incitement to crime, and in spite of our recognition that there are prohibited utterances that cross the line, a borderland remains in which clever speakers can hide, with form, the substance of what they say." *Id.* at 1–2; *see also* Alan M. Kratz, Note, *Unpopular Advocacy Versus True Threat:* United States v. J.H.H., 28 Creighton L. Rev. 823, 848–53 (1995).

constitutes a true threat, no First Amendment protection should be given and no further analysis is required. Similarly, in cases where the plaintiff brings suit only under a threat theory, the analysis need not proceed beyond the jury's inquiry into whether the speech in fact rises to the level of a threat. If the evidence does not support finding a true threat, however, the jury should assess whether the speaker directed the speech to incite violence and whether the speech was likely to incite imminent violence.[127]

A. Evaluating Content, Context, Audience, and Intent to Distinguish Threats from Advocacy

For purposes of instructing a jury and reviewing facts on appeal, courts should adopt the following definition: A true threat exists when a communication threatening physical harm is directed to the target, intended to intimidate or interfere with the target's freedom of action, and reasonably believed in context to have some likelihood of resulting in violence.[128] This definition, deconstructed and framed as four broad inquiries, would require factfinders to consider evidence of the following:

1. The speech's content: Would a reasonable person understand the message as a threat of bodily harm?
2. The context: Did the atmosphere lend threatening meaning to the communication?
3. The audience: Was the communication sufficiently directed toward or reasonably believed to reach the target?
4. The speaker's intent: Did the speaker intend to intimidate or interfere with the target's freedom of action?

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127. *See* Cass R. Sunstein, *Democracy and the Problem of Free Speech* 123–24 (1993).

> [M]uch of free speech law should have a simple structure. The first question is: Does the speech at issue fall inside the constitutional core? If so, it can be regulated only on the gravest showing of harm. A protest against a war cannot be stopped unless the protest is nearly certain to cause immediate and serious harm.

Id.

128. *See, e.g.*, *Black's Law Dictionary* 1030 (abr. 6th ed. 1991) (defining threat as "communicated intent to inflict physical or other harm on any person . . . [or a] declaration of one's purpose or intention to work injury to the person, property, or rights of another, with a view of restraining such person's freedom of action").

This method for identifying threats draws upon existing criteria and authority to provide guidance to courts assessing whether speech constitutes an unlawful threat or protected political advocacy.[129]

In distinguishing threats from constitutionally protected expression, juries should routinely consider these four factors together. Examination of these evidentiary elements would inform the jury's determination of whether the speech constitutes a threat but should not be viewed as a "test" in which the presence of any "threatening" element would remove First Amendment protection or the absence of an element would demand protection. For example, the content of some speech may appear facially threatening, but the speaker's intent, the context, and the audience will indicate that the speech did not constitute a true threat. An actress on stage clearly may say, "You will die by hand tonight!" In other situations, the speaker may intend to threaten and use threatening words directed at his target, but the speech nonetheless fails to rise to the level of a true threat because of the context. For example, the First Amendment allows a football player to tell an opposing quarterback, "You'll need a stretcher after this play, because I'm going to hurt you!" In yet another example, neither the words nor the context may appear threatening, yet the intent could in fact indicate a true threat. This category would reach the mob boss who invites an enemy to join him for a drink, and then says, "Tell your uncle I'm sending our friend Jimmy to pay him a visit."

Courts commonly consider various combinations of these four factors when evaluating speech. In *Watts*, the Court considered the antidraft sentiment and the conditional words used (the content), the political debate at which the speech was made (the context), the crowd's reaction of laughter (the audience), and the defendant's use of hyperbole to express an opinion (the intent).[130] In *Brandenburg*, the Court noted the conditional nature of the language used and the generality of the targeted groups (the content), the private political rally (the context), the group of like-minded people to whom the speech was directed (the audience), and the speaker's apparent desire to urge political figures to adopt the Klan's

129. *See supra* Part II.C; *see also* Crump, *supra* note 126, at 51. Crump suggests eight evidentiary factors to consider in identifying incitement. While his proposal focuses on advocacy rather than threats and seems unnecessarily complex, it does urge consideration of the speech's express words or content, the expression's context and audience, and the speaker's knowledge or disregard of the likelihood of violent results. *See id.*

130. *See* Watts v. United States, 394 U.S. 705, 706 (1969) (per curiam).

white supremacist viewpoint (the intent).[131] While courts regularly look to these factors when evaluating speech, different courts have articulated their considerations differently or weighed one factor more heavily while ignoring others. By adopting a synthesized test for distinguishing threats from advocacy, courts would assess constitutional rights more systematically.

1. Content Reasonably Understood as a Threat of Bodily Harm

Courts commonly distinguish protected speech from certain limited categories of unprotected speech based on content[132]—the actual language used or communication made. Cases dealing with First Amendment protection for potentially threatening speech generally contain a direct quote of the actual words used.[133] Examining speech's face value, however, should provide only the first step in determining meaning.[134] *Hess v. Indiana*[135] offers an example of the errors that can be made when words are interpreted in an excessively literal manner. In that case, the defendant engaged in a demonstration that blocked traffic on a public street.[136] When the sheriff and deputies attempted to clear the blockage, Hess loudly said, "We'll take the fucking street later!"[137] The Supreme Court held that Hess' speech constituted protected speech because nothing in the words themselves urged violence or law violations.[138] As the dissent noted, however, "Surely the sentence . . . is susceptible of characterization as an exhortation, particularly when uttered in a loud voice facing a crowd."[139] Court evaluations of speech protection cannot be bound by strictly literal interpretations. In *Hess*, an

131. *See* Brandenburg v. Ohio, 395 U.S. 444, 445–48 (1969) (per curiam).

132. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Shackelford v. Shirley, 948 F.2d 935, 938 (5th Cir. 1991) ("As speech strays further from the values of persuasion, dialogue and free exchange of ideas the first amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to . . . effectively neutralize verbal expression.").

133. *See, e.g., supra* notes 59, 62, 75, 84.

134. *See, e.g., Restatement (Second) of Torts* § 31 (1965) ("Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.").

135. 414 U.S. 105 (1973) (per curiam).

136. *See id.* at 106–07.

137. *Id.* at 107.

138. *See id.* at 108–09.

139. *Id.* at 111 (Rehnquist, J., dissenting).

evaluation of the speaker's intent and the context of his statement, which the court inadequately addressed, could have led to a conclusion that the speaker intended to incite the crowd to resist the officers forcefully, or that he intended to threaten the police with future violent action. In fact, the Seventh Circuit concluded that very similar speech, "Don't let the pigs take the hill," did in fact constitute unprotected incitement based on the speaker's intent and the audience to whom the words were directed.[140] When examining content—the first line of inquiry in evaluating speech—juries and courts should examine not only the literal words but also any implicit message.

Words threatening nonviolent action should not be considered true threats unprotected by the First Amendment. Despite the Ninth Circuit's holding in *McCalden*,[141] threats of economic harm or business disruption should not be considered true threats; a rule to the contrary would remove First Amendment protection for much expression vital to our society, such as threats of labor strikes or boycotts. Similarly, words suggesting that the target's actions will result in public humiliation, financial ruin, or social ostracism—tactics commonly used in product boycotts and political races—should not be considered true threats.

2. *Context Associated with Speaker Giving the Message Threatening Meaning*

The second evidentiary factor in determining whether speech constitutes a threat should be the context: do contextual facts indicate that the speech reasonably would be understood as an expression of ideas or an attempt to cause fear? The context considered, however, must be limited to the context the speaker reasonably could expect others to associate with his or her actions and communication.[142] The Supreme Court often has looked to context as a critical factor in evaluating speech.[143]

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140. Unites States v. Dellinger, 472 F.2d 340, 350–51 (7th Cir. 1972).

141. *See* McCalden v. California Library Ass'n, 955 F.2d 1214, 1222 (9th Cir. 1992).

142. *See* United States v. Fulmer, 108 F.3d 1486, 1497 (1st Cir. 1997) (holding that trial court erred in allowing testimony about Oklahoma City bombing in assessing whether defendant's unrelated words, "The silver bullets are coming," constituted threat).

143. *See* Towne v. Eisner, 245 U.S. 418, 425 (1918); *see also* United States v. Malik, 16 F.3d 45, 50 (2d Cir. 1994) (quoting United States v. Prochaska, 222 F.2d 1, 2 (7th Cir. 1955)).

Certain speech, because of its context, should be subject to a strict liability standard regardless of the speaker's intent. For instance, making a joke about semiautomatic weapons would not be protected speech at an airport security checkpoint; even if intended as a political statement about international terrorism, security guards would understand the speech in context as a serious threat, which exempts the speech from First Amendment protection. Threats against the President of the United States generally receive strict liability treatment as well, regardless of the speaker's intent.[144] While *Watts* offers an obvious exception, most cases dealing with threats against the President apply minimal scrutiny before denying constitutional protection.[145] Similarly, the classic example of falsely shouting "Fire!" in a crowded theater should not be given First Amendment protection. Because of its ability to prompt action with potentially harmful results such as panic or stampede, the speech in context will not be given constitutional privilege, even if the speaker intends merely to test theater employees' emergency preparedness. Courts have applied the equivalent of strict liability to speech in certain contexts, regardless of the speaker's intent or whether any overt acts resulted.

3. Message Reasonably Believed to Reach the Target Audience

Examining the speaker's chosen audience and the audience's reaction also can assist courts in determining whether particular speech constitutes a threat. Words interpreted as simple advocacy in the context of a speech to a sympathetic audience might instead be interpreted as a threat when addressed directly to a target of action contemplated by the speech. For example, if the defendant in *Brandenburg* had said directly to an African-American family that he believed Caucasian people should "bury the niggers," that speech likely would have been classified a true threat under *Watts* and would not have received First Amendment protection. But because Brandenburg's words contained no specifically named target and instead were directed to sympathetic third parties, the

144. *See, e.g.*, United States v. Callahan, 702 F.2d 964, 965–66 (11th Cir. 1983) (per curiam) (affirming conviction of defendant who threatened Reagan and Bush and later said he intended statement to be political hyperbole).

145. *See id.*

Court classified his speech as protected advocacy of racist ideas. Similarly, if Watts had made his statement to a drill sergeant the first day of basic training, the statement likely would have been considered a true threat based on the chosen audience.

A communication need not be explicitly directed to the target, however, if the message foreseeably would reach the target or an agent of the target. Letters sent to the Secret Service threatening the President, for example, are sufficiently targeted to constitute true threats.[146]

4. Speaker Intended to Cause Intimidation or Fear

In identifying whether particular speech constitutes a true threat, courts should look to the speaker's intent. If the speaker intended or knowingly disregarded that the speech would cause intimidation and fear, the intent requirement would be satisfied. The standard articulated in *Alkhabaz*, requiring that the communication's purpose be "to effect some change or achieve some goal through intimidation," would provide one basis for finding intent under the proposed test.[147] By also including speech made with knowing disregard of its likely threatening effects, the proposed standard would deny constitutional protection for Alkhabaz if the government could prove he knew, even if he did not intend, that his use of a classmate's name in a story about rape and torture would intimidate her.[148]

Many cases evaluating cross burning have relied on an analysis of intent:[149] When a cross is burned solely with the intent to intimidate, a court should find a true threat. However, if the purpose is to communicate ideas of white supremacy and not to intimidate, even when fear results, the speech contains social value as an exposition of ideas and should be given First Amendment protection.[150] A subtle distinction here exists: if the speaker does not intend to intimidate but fear results *unexpectedly*, the intent requirement is not met; yet if the speaker

146. *See id.* at 965.

147. United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997).

148. *See id.*

149. *See, e.g.*, United States v. J.H.H., 22 F.3d 821, 826–27 (8th Cir. 1994); *supra* Part II.C.4.

150. *See supra* Part II.C.4.

apathetically expects that his speech will intimidate, the intent requirement may be proven through evidence.[151]

Intent to *execute* the threat, which was required by the Second Circuit in *Kelner*,[152] imposes a standard higher than necessary. In comparison, the Restatement (Second) of Torts articulates a lower standard—to hold an actor liable for making a threat, "it is not necessary that he have or that he believe that he has the ability to inflict the harmful or bodily contact which his act apparently threatens."[153]

Consideration of the speaker's intent would encompass most of the true threat cases now evaluated under *Watts*, in which the speaker desires only to cause fear of bodily harm. Evaluating the speaker's purpose also would protect a clumsy or inarticulate speaker from liability for speech never intended as a threat.[154] While impossible to know a speaker's thoughts and true intent, jurors should consider evidence of intent just as they would assess *mens rea* for any crime or cause of action requiring specific intent. Under the purely objective test now used in many circuits,[155] the reasonable person standard that disregards the speaker's actual purpose can result in liability for "negligent" speech.[156]

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151. Other courts also have indicated that intent should be a primary factor in assessing First Amendment protection. For example, the Ninth Circuit, despite its adoption of an objective standard in assessing true threats, had explicitly stated in an earlier case that "intent [is] . . . the determinative factor separating protected expression from unprotected criminal behavior," while indicating that such determination of intent should be made by the trier of fact. United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir. 1987), *appeal after remand*, 884 F.2d 454 (9th Cir. 1989) (rejecting defendant's argument that subtle language containing no explicit message of impending harm could not constitute criminal threat).

152. *See* United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976).

153. *Restatement (Second) of Torts* § 33 (1965).

154. But see *supra* Part III.A.2 for a discussion of strict liability speech.

155. *See supra* Part II.C.4.

156. *See* Rogers v. United States, 422 U.S. 35, 47 (1975) (Marshall, J., dissenting). Under an objective test,

> the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. In essence the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes. . . . [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.

Id. (citations omitted).

Constitutional protection demands that a higher standard be applied to speech.[157]

B. *Evaluating Speech's Likelihood to Incite Imminent Violence*

If a jury determines that speech meets the definition of a true threat, no First Amendment protection should be given. In the alternative, if the jury determines that the speech did not constitute a true threat but was directed toward inciting violence, the jury should assess the speech's likelihood of producing imminent violence. If a high likelihood of imminently resulting violence exists, the jury should not accept a First Amendment defense. This second inquiry satisfies the requirement of the *Brandenburg* test.[158]

IV. FOUR-PART DEFINITION APPLIED TO *LIFE ACTIVISTS*

A two-step analysis synthesizing *Brandenburg* and *Watts* would not change the outcomes of cases with facts analogous to those two cases, yet a consistently employed analysis would provide more thorough scrutiny for cases such as *Life Activists* where political advocacy contains threatening undertones. The plaintiffs in *Life Activists* based their case on the theory that the activists' speech constituted a true threat, not on the theory that it incited violence. As a result, in a pre-trial ruling the judge dismissed the defendants' assertions that the *Brandenburg* test should be used. The judge's analysis consisted of just one footnote, explaining, "Plaintiffs are not pursuing an incitement to violence theory,"[159] so the second step evaluating the speech's likelihood of causing imminent violence would be unnecessary. Evaluating the case under threat analysis, though, the district court judge instructed the jury to determine

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157. *See* Memorandum of ACLU Foundation of Oregon, Inc., *Amicus Curiae*, Regarding Defendants' Motions for Summary Judgment at 19–28, Planned Parenthood v. American Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998) (Civ. No. 95-1671-JO); Memorandum of ACLU Foundation of Oregon, Inc., *Amicus Curiae*, Regarding Defendants' Motions to Dismiss at 7–10, Planned Parenthood v. American Coalition of Life Activists, 945 F. Supp. 1355 (D. Or. 1996) (Civ. No. 95-1671-JO).

158. Such analysis also may benefit from the consistent use of more explicit factors to identify when speech satisfies *Brandenburg*'s requirements. That issue, however, is beyond the scope of this Comment.

159. Planned Parenthood v. American Coalition of Life Activists, 945 F. Supp. 1355, 1371 n.13 (D. Or. 1996).

whether the activists' speech met the Ninth Circuit standard for true threats. The district judge's instructions to the jury stated:

> A statement is a "true threat" when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault. This is an objective standard—that of a reasonable person. Defendants' subjective intent or motive is not the standard that you must apply in this case.[160]

Using this standard, the jury found the speech did constitute a true threat.[161] An evaluation of the content, context, audience, and intent of the activists' speech, however, highlights the many difficult questions of fact in a case like *Life Activists*. A jury verdict either for or against the plaintiffs likely could have been defended on appeal; strong arguments exist for both sides. The problem in the *Life Activists* case lies not necessarily in the outcome but rather in the court's effort at distinguishing true threats from political advocacy. Had the court instructed the jury using the proposed four-part definition of threat, the jury would have been given a more methodical approach for reaching its decision. The verdict, for either the plaintiffs or the defendants, would be

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160. Jury Instruction No. 10, Planned Parenthood v. American Coalition of Life Activists (D. Or. 1999) (Civ. No. 95-1671-JO). The instruction further states:

> [E]ven if you believe that the defendants did not intend the statements to be threatening, you must still find those statements to be threats if you conclude that a reasonable person would have foreseen that those statements, in their entire factual context, would have been interpreted as statements of an intent to bodily harm or assault.
>
> ... The word "context" means all of the facts and information that would have been known to the person making the statement, including the events surrounding each publication of the statement and the reaction of the listeners to it.... In evaluating context, you should also consider evidence presented by the defense of non-violence and permissive exercise of free speech.
>
> ... The evidence concerning other posters, other statements and actions, history of violence, including the violent actions of others you have heard evidence about, and defendants' subjective motives are admissible to show the context or circumstances in which the defendants allegedly made the statements, and which you must consider in determining whether a reasonable person should have foreseen that any of the three statements at issue would be interpreted as threats.
>
> ... Further, you need not find that the defendants intended to carry out the threat or were even capable of carrying out the threat in order to find that a statement was, in fact, a threat. Nor must you find that any of the defendants actually intended to threaten plaintiffs, so long as you find that a reasonable person would have foreseen that it would be understood to be threatening.

Id.

161. *See* Verhovek, *supra* note 8.

grounded on more thorough evaluation of the evidence. The *Life Activists* case exemplifies a challenging case in which political advocacy and threats of violence have become entwined. For this very reason, a systematic examination of specific issues of fact must be carefully conducted. The proposed definition of true threats can provide such guidance.

A. The Content

The content of the abortion protestors' speech contained an inherently political message including no explicit threats of violence. The words' literal interpretation urged only lawful methods of peaceful protest. While the web site and posters included inflammatory language, much of it expressed the activists' opinion that abortion constitutes murder. Therefore, on its face, the language could be interpreted strictly as describing what the activists viewed as violence committed by the doctors, rather than violence intended by the activists. Similarly, although *The Nuremberg Files* web site contained a list of abortion providers with a legend indicating those killed or injured, such information constitutes factual matters and cannot on its face be deemed a true threat. Based on its ambiguity and lack of specificity, the language alone cannot prove that the activists intended to threaten or incite violence. In a different context, one could imagine abortion rights supporters compiling a nearly identical list to document the violence against abortion doctors and to urge heightened protection for clinics. Therein lies the central inquiry: in context, did the words convey a meaning different from the literal message, understood both by the activists and by the audience?

B. The Context

In one context, the activists' speech could be understood as impassioned political propaganda. The speech contained no explicitly threatening words, and District Judge Robert E. Jones acknowledged, "Significantly[,] . . . no statement contained in the text of the Deadly Dozen poster, the Crist poster, or *The Nuremberg Files* is expressly

threatening, in the sense that there are no 'quotable quotes' calling for violence against the targeted providers."[162]

On the other hand, the plaintiffs showed evidence of a correlation between past posters targeting specific doctors and the subsequent murder of the particular doctors named, as well as evidence that several of the defendants had signed petitions supporting those prosecuted for the killings.[163] Additional evidence showed that the Deadly Dozen poster, first published in January 1995, included the name of an abortion doctor who had been shot in both arms in August 1993.[164] The fact that the shooting predated the poster indicates that the activists knew a correlation would be drawn between the poster and actual violence. After the shooting but before the publication of the Deadly Dozen poster, one of the *Life Activists* defendants wrote in an antiabortion publication that the defendant charged in the shooting was a "courageous" woman with whom "we were very proud to be associated."[165]

C. *The Audience*

In most true threat cases, the recipient of the communication also is the target of the threat or an agent of the target.[166] In *Life Activists*, the activists did not communicate their message directly to targeted doctors. Rather than being distributed at an event or location where immediate lawless action might be foreseeable, such as an on-site abortion clinic protest, the Deadly Dozen and Crist posters were distributed to fellow activists at antiabortion rallies in Washington, D.C., and St. Louis, Missouri.[167] No evidence showed that the named abortion doctors were anywhere near the rallies or were the direct audience of any implied threats contained in the posters.[168]

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162. Planned Parenthood v. American Coalition of Life Activists, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998).

163. *See* Planned Parenthood v. American Coalition of Life Activists, 41 F. Supp. 2d 1130, 1134 (D. Or. 1999).

164. *See id.* at 1132.

165. *Id.*

166. *See, e.g.*, United States v. McDermott, 29 F.3d 404 (8th Cir. 1994); United States v. Cox, 957 F.2d 264 (6th Cir. 1992); United States v. Khorrami, 895 F.3d 1186 (7th Cir. 1990); United States v. Callahan, 702 F.2d 964 (11th Cir. 1983).

167. *See Life Activists*, 41 F. Supp. 2d at 1131–32.

168. *See id.*

The activists made *The Nuremberg Files* available to the general public on the World Wide Web. While not directly communicating to the targeted doctors, the activists could reasonably believe that the doctors would learn of the site and its contents. The web site provided unrestricted access to anyone with a modem and a web browser. In fact, the doctors did become aware of the web site and did feel threatened.

D. The Intent

Perhaps the activists' intent in distributing the "wanted" posters was to communicate strong feelings about a heated political issue. While some may argue that the activists intended to intimidate the doctors, this alone should not be the basis for denying First Amendment protection. People often use words to intimidate. As an example, consider the priest who tells a group of young choir boys, trembling with fear, that they will suffer eternal damnation and hellfire if they fail to follow God's teachings. The priest intends to make the boys fearful of what might occur should they stray from the righteous path. The fact that words are intended to induce fear does not alone satisfy the test for true threats when the action threatened is not unlawful or violent.

The stated premise of *The Nuremberg Files* web site was to collect information on abortion doctors, in the fanciful hope that they would be prosecuted for murder some day.[169] Such a premise, now viewed as fictional and highly unlikely, to some degree undercuts any potentially threatening interpretation; much like *Watts*' political hyperbole, the web site could be interpreted as an extreme way of intertwining strong feelings about abortion with an imaginative concept of how justice could be done. On the other hand, the stated premise may be a subterfuge, and the primary purpose may actually be intimidation. If the activists truly did not intend to cause intimidation or make the doctors fearful enough to stop performing abortions, one would assume their activities would end once they learned of the extreme safety precautions taken by the doctors as a result of the posters and web site. Many aspects of the activists' speech indicate that they did intend to intimidate: the inclusion of the doctors' home addresses and their children's names on the web site, the posters' large and small typeface that emphasized the most threatening words while de-emphasizing the innocuous message, and the

169. *See supra* text accompanying note 20.

Life Activists' publicly stated position justifying homicide to prevent abortion all support the argument that the activists intended to cause fear.

Perhaps the most challenging factual question presented by *Life Activists* can be seen in the subtle distinction between intending to cause fear and intending to create opprobrium in the community that might make those targeted more vulnerable to violence. If one believes that the activists meant no harm to the doctors, the question becomes whether the activists can incur liability based on others' increased ability to carry out violence because of the heightened public spotlight on the doctors. The *Life Activists* case presents extremely difficult factual questions that cannot be easily resolved. Use of the four-part test, however, would ensure a more thorough and systematic application of the principles of *Watts*, *Brandenburg*, and related circuit court precedent.

V. CONCLUSION

As a society, we refuse to tolerate threats. We believe that law-abiding citizens should be permitted to go about their private business without having to wear bulletproof vests, watch their backs, or live in fear. Yet we also live in a country founded on the principle that political debate should be robust, and the government should not be permitted to silence unpopular speech. A guarantee of free political speech gives our democratic government its solid foundation.

These values collide in cases like *Life Activists*, where political advocacy is wedded, intentionally or not, to underlying intimidation. While *Brandenburg* and *Watts* offer solid principles for determining First Amendment application to dangerous speech, the precedent developed under them has resulted in inconsistent and unpredictable protection for political speech. Courts should follow a two-step analysis, synthesizing *Brandenburg* and *Watts* and firmly rooted in circuit court precedent, which would assist courts in identifying threats while providing due protection to political advocacy. By instructing juries to evaluate the content, context, audience, and intent of challenged speech, courts can ensure a methodical—albeit often difficult—consideration of evidence indicating whether speech deserves protection.